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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TROY ARTHUR KNOX, Defendant and Appellant.	A094025 (Solano County Super. Ct. No. FC49381)

Defendant was convicted of two counts of vehicular manslaughter without gross negligence (Pen. Code, § 192, subd. (c)(3)) and two counts of driving under the influence while causing bodily injury (Veh. Code, § 23153, subds. (a) & (b)). He challenges the verdict, arguing that a homicide caused by drunk driving is chargeable only as vehicular manslaughter and therefore the counts alleging a violation of Vehicle Code section 23153 must be reversed, the enhancements must be stricken as they constitute ex-post facto laws, and the trial court committed reversible error by providing the jury misconduct instruction (CALJIC No. 17.41.1). The People concede that the conviction for the felony drunk driving (Veh. Code, § 23153, subds. (a) & (b)) counts must be reversed. We conclude that defendant's other arguments have no merit, and affirm the conviction of two counts of violating Penal Code section 192, subdivision (c)(3) and the enhancement pursuant to Vehicle Code section 23558 for these two counts.

BACKGROUND

On October 31, 2000, a second amended information was filed against defendant, which alleged two counts of vehicular manslaughter without gross negligence (Pen. Code, § 192, subd. (c)(3)), one count of driving under the influence and causing bodily injury to another person (Veh. Code, § 23153, subd. (a)), and one count of driving with a .08 percent blood alcohol content and causing bodily injury to another person (Veh. Code, § 23153, subd. (b)). In connection with the latter two counts, the information further alleged that defendant personally inflicted great bodily injury on the victims within the meaning of Penal Code section 12022.7, subdivision (a). In connection with all the counts, the information alleged that defendant caused injury and death within the meaning of Vehicle Code section 23558.

A jury trial began on December 7, 2000, and defendant admitted the great bodily injury allegations. There was testimony that at about 2:00 a.m., September 25, 1998, Vaughn Charles Naber was driving a bobtail truck on Interstate 80 when he saw debris on the road and swerved his vehicle to avoid striking it. As he swerved, he noticed a car stopped, lying on its side, across two lanes of traffic. He applied the brakes, but still hit the car.

Officers Neil B. Tweedy (Tweedy) and Raul Ibarra Munoz of the California Highway Patrol responded to a reported accident on Interstate 80 near Fairfield. One of the vehicles, a red pickup truck, was lying on its side in the grassy area beyond the highway shoulder. Another vehicle, a GMC Caballero, was lying sideways across the middle two lanes of the highway. The Caballero was wrapped around the front of a bobtail truck.

Tweedy went over to the Caballero and the occupants of the car, Emilio Nava (Nava) and Diane Wickersham (Wickersham), were dead; they had died of multiple blunt-force injuries. Tweedy then went over to defendant, who had been driving the pickup truck. Defendant told Tweedy that he had hit a car and proceeded to go off the side of the road. He reported that he had consumed two beers earlier that night. Tweedy smelled alcohol on defendant's breath, and noticed that his eyes were bloodshot. Defendant was transported by helicopter to a hospital.

Tweedy went to the hospital and asked defendant questions after advising him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Defendant stated that he had been driving home from a restaurant where he had been drinking three to four beers and he must have fallen asleep while driving.

Blood drawn from defendant at the hospital was tested and indicated that he had a .10 percent blood alcohol content. Based on the elimination of alcohol between the time of the accident and the time defendant's blood was drawn, and taking into account the oxidization of alcohol that occurs when blood is stored for an extended period of time, a forensic toxicologist estimated that defendant's blood alcohol level would have been .15 to .17 percent at the time of the accident.

Tweedy testified that he believed defendant was driving on the freeway while intoxicated and he applied the brakes and swerved into Nava's vehicle. He opined that defendant's vehicle then skidded out of control and rolled over on the shoulder. Nava's vehicle was pushed into the middle lanes of the highway and the bobtail truck then struck it, killing Nava and Wickersham.

Officer Christopher Linehan (Linehan), an accident investigation review officer for the California Highway Patrol, investigated the accident. Linehan testified that he believed that defendant made an unsafe lane change while moving approximately 20 to 25 miles per hour faster than Nava's Cabrillo, and defendant's truck then hit Nava's car. Defendant's truck went towards the shoulder while Nava's vehicle spun and rested in the middle two lanes of the highway, perpendicular to oncoming traffic. He believed it was foreseeable that Nava's vehicle, which was lying on its side across two lanes of freeway traffic at night, would be struck by oncoming traffic.

Accident reconstruction expert, Rudy Degger, testified for the defense. He stated that he believed defendant was driving no more than 66 miles per hour, and Nava's car was going about 43 miles per hour. He believed that Nava's car may have been coming off the shoulder onto the freeway at this slow speed when defendant's truck hit the car. He said that it was also possible that Nava was moving into another lane at the same time defendant was changing lanes, and the truck struck the car while they were both making a lane change.

Another possibility, he admitted, was that defendant had made an unsafe lane change. He also conceded that defendant could have been driving in excess of the speed limit.

On December 12, 2000, the jury convicted defendant on the four counts alleged in the information, and found the enhancement allegations under Vehicle Code section 23558 true. On January 30, 2001, the trial court denied probation and imposed a two-year base term on count three (Veh. Code, § 23153, subd. (a)), and three years consecutive for causing great bodily injury (Pen. Code, § 12022.7, subd. (a)), for a total sentence of five years on count three. The court stayed the execution of sentence on the remaining counts and special allegations.

Defendant filed a timely notice of appeal.

DISCUSSION

I. *Felony Drunk Driving*

Defendant maintains that he could not be charged and convicted of two counts of felony drunk driving under Vehicle Code section 23153 when his intoxicated driving caused the deaths of the victims and he was charged and convicted under Penal Code section 192, subdivision (c)(3).[1] The People agree. "Indeed, the Legislature reinforced this distinction in 1983 by amending the manslaughter and drunk driving statutes to provide that an intoxicated driver who kills another person is not chargeable under the Vehicle Code, but

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[1] Penal Code section 192, subdivision (c)(3) defines vehicular manslaughter without gross negligence as: "(3) Driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence."

Vehicle Code section 23153 states in pertinent part: "(a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver. [¶] (b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law or neglect any

may only be charged under the manslaughter statutes of the Penal Code." (*People v. McFarland* (1989) 47 Cal.3d 798, 804.) Accordingly, we reverse counts three and four, the conviction of two counts of violating Vehicle Code section 23153.[2]

II. *Vehicle Code Section 23558 Enhancements and Ex Post Facto Law*

The jury found the Vehicle Code section 23558 enhancements true as to all the counts. Since we are reversing on counts three and four, the issue remaining is whether these enhancements were properly applied to the first two counts of vehicular manslaughter (Pen. Code, § 192, subd. (c)(3)). Defendant contends that section 23558 became operative on July 1, 1999, but he committed these offense on September 25, 1998. Therefore, he argues, the enhancements, as applied to him, violated the ex post facto law under both the California and United States Constitutions.

The ex post facto clause of the California Constitution is to be analyzed identically to that of the United States Constitution. (*People v. McVickers* (1992) 4 Cal.4th 81, 84, overruled on another issue in *Collins v. Youngblood* (1990) 497 U.S. 37, 42-52.) There are four categories of ex post facto laws (*Calder v. Bull* (1798) 3 U.S. 386, 390 (*Calder*)): "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." (*Ibid.*)

Vehicle Code section 23558 provides: "Any person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section

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duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver. . . ."

[2] This disposition moots defendant's argument that a great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a)) may not be imposed with a conviction for violating Vehicle Code section 23153.

23153 of this code or in violation of Section 191.5 of, or paragraph (3) of subdivision (c) of Section 192 of, the Penal Code, shall, upon a felony conviction, and notwithstanding subdivision (g) of Section 1170.1 of the Penal Code, receive an enhancement of one year in the state prison for each additional injured victim. The enhanced sentence provided for in this section shall not be imposed unless the fact of the bodily injury to each additional victim is charged in the accusatory pleading and admitted or found to be true by the trier of fact. The maximum number of one year enhancements which may be imposed pursuant to this section is three. . . ."

At the time defendant was involved in the accident, former section 23182 of the Vehicle Code was in effect. Indeed, the felony complaint filed against defendant on October 20, 1998, alleged enhancements pursuant to former section 23182. Between the time of defendant's offense and the filing of the second amended information, the Vehicle Code was renumbered, and no substantive changes were intended or effected. (*People v. Superior Court (Blanquel*) (2000) 85 Cal.App.4th 768, 772-773 [Vehicle Code section 23550.5 did not alter the law or increase the penalty and the provision was simply enacted "as part of a grand renumbering of the statutes in the Vehicle Code."].) Section 23182 was replaced by section 23558, and the language of these two provisions was essentially identical. Since former section 23182 had been repealed and section 23558 was in effect by October 31, 2000, when the second amended information was filed against defendant, the information properly alleged enhancements pursuant to Vehicle Code section 23558, which had become effective in 1999.

Accordingly, none of the categories of ex post facto laws set forth in *Calder, supra,* 3 U.S. at page 390 applies to the case before us. Here, there was no change in the law; only a change in the numbering of the statute. Defendant clearly had fair notice under the due process clause of both the state and federal Constitutions. Vehicle Code section 23558 did not punish defendant for an act that was innocent when committed; it did not increase the punishment for his crime; and it did not deprive him of a defense available at the time the act was committed.

Defendant's argument is completely devoid of any merit.

III. *CALJIC No. 17.41.1*

Defendant contends his trial was rendered fundamentally unfair when the trial court provided CALJIC No. 17.41.1. The court instructed the jury as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Defendant now contends that the instruction improperly compromised the private and necessarily uninhibited nature of jury deliberations. The instruction is intended to prevent jury nullification, that is, to prevent jurors from refusing to apply a law they perceive as being unjust. However, defendant contends it violated the jurors' rights to freedom of speech. Defendant has standing to assert the constitutional rights of the jurors. (See, e.g., *Powers v. Ohio* (1991) 499 U.S. 400, 415.) Defendant argues that the giving of the instruction tainted the entire jury deliberation process and it therefore was a structural defect, which requires reversal without any consideration of prejudice (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310).

This instruction is currently on review before the Supreme Court. (E.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297 (review granted April 26, 2000, S086462).) However, no court has held that providing this instruction is reversible per se. Rather, all courts concluding that the instruction should not be given have applied the harmless error analysis.[3]

While this issue has been raised in our court in other contexts, we need not reach the question of whether the instruction should be given. Here, the potential problem with providing CALJIC No. 17.41.1 does not rise to the level of a structural defect such that it automatically upsets the entire jury deliberation process. If there is a problem with the

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[3] The Second District has articulated its dissatisfaction with this instruction, but applied the harmless error analysis. This case, too, is under review by the Supreme Court. (*People v. Taylor* (2000) 80 Cal.App.4th 804 (review granted Aug. 23, 2000, S088909.)

instruction, it is that it might stifle free and open discussion; jurors could be afraid of being reported for their comments. However, if there is no evidence that there was a jury deadlock, that there were holdout jurors, or that jurors were refusing to follow the law, there is no evidence that CALJIC No. 17.41.1 affected the verdict in any way.

Here, even presuming the instruction was given erroneously, defendant has failed to demonstrate that the instruction prejudicially impacted his trial. There is no indication of misconduct or that the jury was affected in any way by the instruction. We therefore conclude there is no basis for reversing the judgment based on the giving of CALJIC No. 17.41.1.

DISPOSITION

We reverse the judgment of conviction for violating Vehicle Code section 23153, subdivision (a) and for violating section 23153, subdivision (b), and for the enhancements related to these two counts, and the matter is remanded for resentencing in accord with this opinion. In all other respects, we affirm the judgment.

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Lambden, J.

We concur:

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Kline, P. J.

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Haerle, J.